A

Shihan bin Mohd Salim v Public Prosecutor

B HIGH COURT (KOTA KINABALU) — CRIMINAL APPEAL NO BKI-42H-20/9 OF 2018
NURCHAYA ARSHAD J
23 JULY 2020

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant was convicted for price gouging and failure to display price tags for dishes sold — Whether ownership of premise was a requirement — Whether testimonies ought to be disregarded for inconsistencies — Whether there was evaluation done by the sessions court judge at the close of the defence's case* D *— Whether sentencing imposed was manifestly excessive — Price Control and Anti Profiteering Act 2011 s 21*

This was an appeal against the conviction and sentence by the sessions court. The appellant was convicted of the offence under s 21(5) of the Price Control E and Anti Profiteering Act 2011 ('the Act') punishable under s 57 of the Act and sentenced to a fine of RM30,000, in default six months imprisonment. The background facts were that upon receiving complaints of drinks' price gouging and failure to display price tags for dishes sold at the premises of Nasi Kandar Anak Mami The Restaurant 3 at Menggatal Plaza, Kota Kinabalu, three F Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan ('KPDNKK') officers, namely PW1, PW2 and one Dato Nazrin Dato Vajin were dispatched to the premises to investigate the matter on 27 March 2016. While at the premises, they approached and introduced themselves to PW3 and PW5 who in return, identified themselves as the person in charge of the G premises and its worker respectively. After informing them off the purposes of their visit, the KPDNKK officers proceeded with their inspection at the premises. Through this inspection, they found that the complaints were indeed true. There were no price tags displayed for dishes sold at the premises and that the price of the drink, Milo Ais was sold at a drastically marked-up price. Due H to the failure of the premises to display price tags of dishes sold, the premises were compounded on the spot which was duly paid by PW3 upon its issuance. As for the suspected price gouging, a notice under s 21(1)(b) of the Act ('the first notice') together with Notice 21 and Lampiran A were issued to PW3 to which PW3 admitted of receiving and signing to acknowledge receipt in his I testimony during trial. The content of the first notice, which required the premises to provide information stated in Notice 21 and supporting documents justifying the increased price of the Milo Ais drink sold at the premises were also explained to PW3 by PW1. However, until the expiry of seven working days from the date of the first notice, the premises made no

compliance to the directions in the first notice. Due to the failure to comply with the first notice, KPDNKK officers consisted of PW1, PW4 and one Mohd Riezan bin Sutrisno went to the premises again on 9 May 2016 to issue another notice under s 21(1)(a) of the Act ('the second notice') together with Notice 21 and Lampiran A. The second notice and its attachments were duly received by PW5 who admitted to the KPDNKK officers to be the supervisor of the premises for the day. Nonetheless, despite having received the second notice, there was no response from neither the owner nor any representatives of the premises. This resulted in the charge against the appellant and this appeal. The issues to be determined in this appeal were: (a) whether the assistant controller, in exercising his power under s 21 of the Act, must established the person investigated was the owner of the premises; (b) whether the learned session court judge ('SCJ') had erred in ruling the inconsistencies between the testimonies of PW3 and PW5 as immaterial and not to be disregarded; (c) whether there was no evaluation done at the close of the defence's case by the SCJ; and (d) whether the sentencing imposed against the appellant was manifestly excessive.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Section 21(1) of the Act provided for the power of the assistant controller or assistant price controller to be exercised against any person that the assistant controller in carrying out his investigation has reason to believe to have any relevant information or evidence necessary for the performance of the assistant controller's powers and functions under the Act. Nothing was said about 'ownership' and the court found no reasons to read such word into these provisions. Thus, the court found it impertinent to delve into the argument on who was the owner of the premises (see para 8).

(2) The court agreed with the findings made by the learned SCJ. PW5 may be the supervisor who was in charge of the daily operation of the premises. However, based on his oral testimony in court, he was answerable to the appellant. All instructions came from the appellant with all records and money was being kept by the appellant who would come to collect every night, thus the person having the relevant information and evidence necessary for the performance of the assistant controller's powers and functions would be none other than the appellant. The appellant was therefore estopped from averting now that PW5 should be liable to the second notice (see paras 12–13).

(3) The court opined that the appellant had taken an erroneous approach in dealing with the discrepancies and contradictions in witnesses' testimonies, for these discrepancies and contradictions would always be present in any case. Thus, albeit there appeared to be discrepancies or contradictions in the witnesses' testimonies, provided that they did not

relate to any material matter, they were of no consequence and would not render the evidence of these witnesses liable to be disregarded (see paras 15–16).

(4) The court found the contention that there was no evaluation done at the close of the defence's case, to be without merit as the allegation had been dissected and discussed in great detail in the grounds of decision of the SCJ. The SCJ had also explained as to why the testimonies of PW3 and PW5 especially on the issue of ownership of the premises were given credence to as theirs were more consistent with that provided in the trading license of the premises (see para 19).

(5) The court found no appealable error made by the SCJ in passing sentence that would warrant appellate intervention. The court also agreed with the SCJ that such a heavy sentence of fine was necessary to serve as a lesson to the appellant and any would be offenders to be more observant to the directions of enforcement authorities. Thus, the court found the fine sentence imposed by the SCJ to be proper and appropriate in order to drive home the message that such incompliance of would not be tolerated (see para 22).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap sabitan dan hukuman oleh mahkamah sesyen. Perayu telah disabitkan dengan kesalahan di bawah s 21(5) Akta Kawalan Harga dan Antipencatutan 2011 ('Akta tersebut') yang boleh dihukum di bawah s 57 Akta tersebut dan dihukum denda RM30,000, jika gagal membayar, hukuman enam bulan penjara. Fakta kes ini adalah telah terdapat aduan mengenai kenaikan harga minuman dan kegagalan mempamerkan tanda harga bagi hidangan yang dijual di premis Nasi Kandar Anak Mami Restoran 3 di Plaza Menggatal, Kota Kinabalu. Tiga pegawai Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan ('KPDNKK'), iaitu PW1, PW2 dan Dato Nazrin Dato Vajin telah dihantar ke premis tersebut untuk menyiasat perkara tersebut pada 27 Mac 2016. Semasa berada di premis itu, mereka mendekati dan memperkenalkan diri kepada PW3 dan PW5, dan mereka menyatakan mereka sebagai orang yang bertanggungjawab ke atas premis dan pekerjanya masing-masing. Selepas memaklumkan tujuan lawatan mereka, pegawai KPDNKK meneruskan pemeriksaan di premis tersebut. Melalui pemeriksaan ini, mereka mendapati bahawa aduan tersebut adalah benar. Tiada tanda harga dipaparkan untuk hidangan yang dijual di premis itu dan harga minuman Milo Ais dijual pada harga yang tinggi. Berikutan kegagalan premis mempamerkan tanda harga hidangan yang dijual, premis tersebut dikenakan kompaun di tempat yang telah dibayar oleh PW3 setelah ia dikeluarkan. Bagi kesalahan harga, satu notis di bawah s 21(1)(b) Akta ('notis pertama') bersama Notis 21 dan Lampiran A telah dikeluarkan kepada PW3 di mana PW3 mengakui menerima dan menandatangani untuk mengakui penerimaan dalam keterangannya semasa perbicaraan. Kandungan notis

pertama, yang mewajibkan premis untuk memberikan maklumat yang dinyatakan dalam Notis 21 dan dokumen sokongan yang membenarkan kenaikan harga minuman Milo Ais yang dijual di premis itu juga telah dijelaskan kepada PW3 oleh PW1. Walau bagaimanapun, sehingga tamat tempoh tujuh hari bekerja dari tarikh notis pertama, premis tidak mematuhi arahan dalam notis pertama. Oleh kerana gagal mematuhi notis pertama, pegawai KPDNKK terdiri daripada PW1, PW4 dan seorang Mohd Riezan bin Sutrisno telah pergi ke premis sekali lagi pada 9 Mei 2016 untuk mengeluarkan satu lagi notis di bawah s 21(1)(a) Akta ('notis kedua') bersama Notis 21 dan Lampiran A. Notis kedua dan lampirannya telah diterima oleh PW5 yang mengakui pegawai KPDNKK sebagai penyelia premis untuk hari tersebut. Walau bagaimanapun, walaupun telah menerima notis kedua, tiada maklum balas daripada pemilik mahupun mana-mana wakil premis. Ini menyebabkan pertuduhan terhadap perayu dan rayuan ini. Isu-isu yang akan ditentukan dalam rayuan ini adalah: (a) sama ada penolong pengawal, dalam melaksanakan kuasanya di bawah s 21 Akta, hendaklah menunjukkan orang yang disiasat itu adalah pemilik premis; (b) sama ada hakim mahkamah sesyen ('HMS') telah terkhilaf dalam memutuskan percanggahan antara testimoni PW3 dan PW5 sebagai tidak boleh terima dan tidak boleh diabaikan; (c) sama ada tiada penelitian terhadap kes pembelaan oleh SCJ; dan (d) sama ada hukuman yang dikenakan terhadap perayu adalah berlebihan.

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Seksyen 21(1) Akta tersebut memperuntukkan bahawa kuasa penolong pengawal atau penolong pengawal harga yang dilaksanakan terhadap mana-mana orang bahawa penolong pengawal dalam menjalankan penyiasatannya mempunyai sebab untuk mempercayai bahawa apa-apa maklumat atau bukti yang relevan yang diperlukan bagi melaksanakan kuasa dan fungsi pneolong pengawal di bawah Akta tersebut. Tiada apa-apa yang dikatakan mengenai 'pemilikan' dan mahkamah mendapati tiada sebab untuk membaca perkataan tersebut ke dalam peruntukan ini. Oleh itu, mahkamah mendapati adalah penting untuk meneliti hujahan mengenai siapa pemilik premis itu (lihat perenggan 8).

(2) Mahkamah ini bersetuju dengan penemuan yang dibuat oleh HMS yang terpelajar bahawa PW5 merupakan penyelia yang bertanggungjawab dalam operasi harian premis. Walau bagaimanapun, berdasarkan keterangan lisannya di mahkamah, dia menjawab kepada perayu. Semua arahan datang dari perayu dengan semua rekod dan wang disimpan oleh perayu yang akan datang untuk mengumpul setiap malam, oleh itu orang yang mempunyai maklumat dan bukti yang relevan yang diperlukan untuk prestasi kuasa dan fungsi Penolong Pengawal tidak lain daripada perayu. Oleh itu, perayu telah dihalang daripada mengalihkan fakta bahawa PW5 harus bertanggungjawab kepada notis kedua (lihat perenggan 12–13).

(3) Mahkamah berpendapat bahawa perayu telah mengambil pendekatan yang salah dalam menangani percanggahan dan percanggahan dalam keterangan saksi, kerana percanggahan dan percanggahan keterangan akan sentiasa muncul dalam mana-mana kes. Oleh itu, walaupun terdapat percanggahan atau percanggahan dalam keterangan saksi, dengan syarat bahawa mereka tidak berkaitan dengan apa-apa perkara material, mereka tidak mempunyai akibat dan tidak akan menyebabkan keterangan saksi-saksi ini bertanggungjawab untuk diketepikan (lihat perenggan 15–16).

(4) Mahkamah mendapati dakwaan bahawa tiada penilaian dibuat pada penutupan kes pembelaan, adalah tanpa merit kerana dakwaan tersebut telah dibincangkan secara terperinci dalam alasan keputusan HMS. HMS juga telah menjelaskan mengapa testimoni PW3 dan PW5 terutamanya mengenai isu pemilikan premis diberi perhatian kerana mereka lebih konsisten dengan syarat yang diberikan dalam lesen perniagaan premis tersebut (lihat perenggan 19).

(5) Mahkamah mendapati tiada kesalahan rayuan yang dibuat oleh HMS dalam menjatuhkan hukuman yang dapat menyebabkan campur tangan rayuan. Mahkamah ini juga bersetuju dengan HMS bahawa hukuman denda yang berat itu perlu dijadikan pengajaran kepada perayu dan mana-mana pesalah akan lebih mematuhi arahan pihak berkuasa penguatkuasaan. Oleh itu, mahkamah mendapati hukuman denda yang dikenakan oleh HMS adalah wajar untuk memberi pengajaran bahawa kesalahan itu perlu dipatuhi orang awam (lihat perenggan 22).]

Cases referred to

De Silva v PP [1964] 1 MLJ 81 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
Pie Bin Chin v PP [1985] 1 MLJ 234 (folld)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Price Control and Anti Profiteering Act 2011 s 21(1)(a), (1)(b), (5)

PJ Perira (PJ Perira & Dasan) for the appellant.
Rustam bin Sanip (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Nurchaya Arshad J:

PRELIMINARY

[1] This is an appeal against conviction and sentence by the appellant, Shihan bin Mohd Salim who was convicted for the offence under s 21(5) of the

Price Control and Anti Profiteering Act 2011 (Act 723) punishable under s 57 of the same Act and sentenced to a fine of RM30,000, in default six months imprisonment. The charge against the appellant is reproduced for ease of reference as follows:

> Bahawa kamu pada 19 Mei 2016, di premis Nasi Kandar Anak Mami The Restaurant 3, Lot No 53, Blok E-0-12, Ground Floor, Menggatal Plaza, Phase II, Kota Kinabalu di dalam Negeri Sabah, selaku pemilik premis telah gagal mematuhi arahan Penolong Pegawal Harga melalui Surat Arahan bertarikh 9 Mei 2016 iaitu dalam bentuk Notis Bertulis yang dikeluarkan di bawah Seksyen 21(2)(a) Akta Kawalan Harga dan Antipencatutan 2011 untuk melengkapkan maklumat dan mengemukakan Resit Jualan bulan Januari 2015 hingga Mac 2016 bagi Milo Ais, Invoice Belian Milo, Susu dan Ais bagi tempoh bulan Januari 2015 hingga Mac 2016, Tanda Harga Milo Ais dari Januari 2015 hingga Mac 2016, dalam tempoh 7 hari bekerja bermula pada 9.05.2016 dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawahseksyen 21(5) Akta Kawalan Harga Dan Antipencatutan 2011 dan boleh dihukum di bawah seksyen 57 Akta yang sama.

BACKGROUND FACTS

[2] Upon receiving complaints of drinks' price gouging and failure to display price tags for dishes sold at the premises of Nasi Kandar Anak Mami The Restaurant 3 at Menggatal Plaza, Kota Kinabalu, three Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan ('KPDNKK') officers, namely PW1, PW2 and one Dato Nazrin Dato Vajin were dispatched to the premises to investigate the matter on 27 March 2016. While at the premises, they approached and introduced themselves to PW3 and PW5 who in return, identified themselves as the person in charge of the premises and its worker respectively. After informing them of the purposes of their visit, the KPDNKK officers proceeded with their inspection at the premises. Through this inspection, they found that the complaints were indeed true. There were no price tags displayed for dishes sold at the premises and that the price of the drink, Milo Ais was sold at a drastically marked-up price. Due to the failure of the premises to display price tags of dishes sold, the premises were compounded on the spot.

[3] The compound was duly paid by PW3 upon its issuance. As for the suspected price gouging, a notice under s 21(1)(b) of Act 723 ('the notice') (exh P1(1–2)) together with Notice 21 (exh P1(3–6)) and Lampiran A (exh P1A) were issued to PW3 which PW3 admitted of receiving and signing to acknowledge receipt in his testimony during trial. The content of the notice, which required the premises to provide information stated in Notice 21 (exh P1(3–6)) and supporting documents justifying the increased price of the Milo Ais drink sold at the premises were also explained to PW3 by PW1. However, until the expiry of seven working days from the date of the notice, the premises made no compliance to the directions in the notice.

[4] Due to the failure to comply with the notice, KPDNKK officers consisted of PW1, PW4 and one Mohd Riezan bin Sutrisno went to the premises again on 9 May 2016 to issue another notice under s 21(1)(a) of Act 723 (exh P3(1–2)) ('the second notice') together with Notice 21 (exh P3(4)) and Lampiran A (exh P3(3)). The second notice and its attachments were duly received by PW5 who admitted to the KPDNKK officers to be the supervisor of the premises for the day. Nonetheless, despite having received the second notice, there was no response from neither the owner nor any representatives of the premises. This resulted in this present charge against the appellant.

THE APPEAL

[5] The appellant sets out 11 grounds of appeal in his petition of appeal. All of these grounds are as follows except grounds number 2.9 which was abandoned in the course of the appeal as indicated in the appellant's written submission (encl 19):

> Grounds of Appeal
>
> 2.1 The learned Sessions Court Judge erred in law and facts when she held that the accused was the owner of the Nasi Kandar Anak Mami Restaurant 3, Menggatal.
>
> 2.2 The learned Sessions Court Judge erred in law and facts when she said that Notice under section 21(2)(a) was served on PW5 who later gave it to Shiran bin Mohd Salim.
>
> 2.3 The learned Sessions Court Judge erred in law when she said the Notice was received by the accused and failed to comply with the 'surat arahan'.
>
> 2.4 The learned Sessions Court Judge erred in law when she said that the defence version that Shihan bin Mohd Salim was a mere nominee was without merits.
>
> 2.5 The learned Sessions Court Judge erred when she said that Shihan bin Mohd Salim was the right person to give the required information to KPDNKK.
>
> 2.6 The learned Sessions Court Judge erred in law and facts when she said that a prima facie case was proved against the accused under section 21(2)(a) of the Price Control and Anti-Profiteering Act 2011.
>
> 2.7 The learned Sessions Court Judge erred when she said that the Court only needs to look at the trading license of the business premise as who is the owner of the premise.
>
> 2.8 The learned Sessions Court Judge erred in law and facts when she said that D5 document was only the intention of the parties and could come into effect on the real transfer or change of ownership in the trading license of the business premise on 6.06.2016.
>
> 2.9 (abandoned)
>
> 2.10 No evaluation done at the close of the defence stage by the learned Sessions Court Judge.

2.11 The sentence of fine of RM30,000.00 was excessive even after a full trial as it is only a summons case.

ANALYSIS AND FINDINGS

Position of the appellant

[6] The appellant placed much emphasis on the question of ownership of the premises, contending that there has been a change of ownership to the premises and therefore the appellant could no longer be held accountable for the offence as per charge. Owing to the deed of retirement of partnership between PW3 and one Mohd Salim bin Mohd Noor dated 31 March 2016 (exh D5), the appellant alleged to be a mere nominee of both the continuing partner and the retiring partner.

[7] Nonetheless, I find no merit in this contention. The relevant provision on s 21 reads:

21 Power of the Assistant Controller to require provision of information

(1) This section applies to a person if the Assistant Controller in carrying out an investigation under this Part has reason to believe that the person —

(a) has any information (including, but not limited to, records, accounts and computerized data) or any document that is relevant to the performance of the Assistant Controller's powers and functions under this Act; or

(b) is capable of giving any evidence which the Assistant Controller has reason to believe is relevant to the performance of the Assistant Controller's powers and functions under this Act.

(2) Notwithstanding the provisions of any other written law, the Assistant Controller, by written notice, may direct any person —

(a) to provide the Assistant Controller, within the period and in the manner and form specified in the notice, any information or document referred to in subsection (1);

...

Section 2 of Act 723 defines 'Assistant Controller' as 'an Assistant Price Controller appointed under section 3'.

[8] It is to be noted here that these provisions provide for the power of the Assistant Controller or Assistant Price Controller to be exercised against any person that the Assistant Controller in carrying out his investigation has reason to believe to have any relevant information or evidence necessary for the performance of the Assistant Controller's powers and functions under Act 723. Nothing was said about 'ownership' and this court finds no reasons to read such word into these provisions. Therefore, this court finds it impertinent to delve into the argument on who is the owner of the premises.

[9] The more germane question to be posited is who has the relevant information or evidence necessary for the performance of the Assistant Controller's powers and functions under Act 723.

[10] The appellant averred that the second notice, which is the subject matter of the charge, was addressed to PW5. As he testified that he worked as the supervisor of the premises, the appellant contended that he has the relevant information or evidence necessary for the performance of the Assistant Controller's powers and functions under Act 723. Due to his failure to comply with the directions provided in the second notice, he should be held responsible instead of the appellant.

[11] On the other hand, the learned DPP sought for this court to affirm the finding of the learned sessions court judge that such contention to be implausible as PW5 was a mere worker who accepted the service of the second notice on behalf of the appellant who PW5 testified to be the 'bos' since he was not around. PW5 then handed over the second notice to the appellant who then informed him that he will take care of it. Having given such assurance, PW5 thus cannot be faulted for failing to comply with the second notice. Being the 'bos', the appellant is the right person to give the required information and evidence to the Assistant Controller as indicated in the second notice.

[12] Upon perusing the grounds of decision of the learned sessions court judge and the submissions of both parties, I find myself to be entirely in agreement with the findings made by the learned sessions court judge. PW5 may be the supervisor who is in charge of the daily operation of the premises. However, based on his oral testimony in court, he is answerable to the appellant. All instructions came from the appellant and all records and money will be kept by the appellant who will come to collect every night. Thus, the person having the relevant information and evidence necessary for the performance of the Assistant Controller's powers and functions would be none other than the appellant.

[13] Moreover, it was not disputed during cross-examination that the appellant did inform PW5 upon receiving the second notice that he will handle the matter. As this fact was not disputed, it shall be taken as amounting to acceptance of PW5's testimony. See *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212. Thus, if it is the appellant's stance that PW5 should be the one to respond to the second notice, he ought to have instructed PW5 to act on the second notice as soon as he received the second notice from PW5. The fact that he told PW5 that he will handle the matter shows that he agreed that it is his duty to respond to the second notice. The appellant is therefore estopped from averting now that PW5 should be liable to the second notice.

Inconsistencies between the testimonies of PW3 and PW5

[14] The appellant submitted that the testimonies of PW3 and PW5 contradict each other. The first contradiction relates to who received the notice and handed it over to the appellant. According to PW3, he was the one who received the notice and so he was also the one who handed it over to the appellant. However, PW5 also testified the same. The second contradiction concerns how frequent the appellant visited the premises. PW3 testified that the appellant would only visit the premises one or twice a week which contradicts the testimony of PW5 who alleged that the appellant would come to the premises every night to collect money. Due to these contradictions, the appellant submitted that they render the credibility of PW3 and PW5 to be highly questionable and thus show that both PW3 and PW5 were lying in court.

[15] This court however opined that the appellant had taken an erroneous approach in dealing with discrepancies and contradictions in witnesses' testimonies, for these discrepancies and contradictions will always be present in any case. See *De Silva v Public Prosecutor* [1964] 1 MLJ 81. In dealing with them, this court is guided by the principle enunciated in *Pie Bin Chin v Public Prosecutor* [1985] 1 MLJ 234 which states:

> Discrepancies ... do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly tooth-combed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these does not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.

[16] Thus, albeit there appears to be discrepancies or contradictions in the witnesses' testimonies, provided that they do not relate to any material matter, they are of no consequence and would not render the evidence of these witnesses liable to be disregarded.

[17] In this instant appeal, the first contradiction relates to the notice dated 27 March 2016 which does not form the subject matter of the charge. The present charge against the appellant pertains to the second notice dated 9 May 2016. Hence, despite the contradiction, it does not relate to a material fact and thus ought not to vitiate the credibility of PW3 and PW5. As for the second contradiction submitted, I concur and therefore affirm the findings of the learned sessions court judge who had succinctly explained this contradiction as immaterial and therefore of no consequence to the witnesses' testimonies in the following terms:

I do not think that they were lying even though their testimony on the above issue were contradicting. It is my opinion that their testimony may differ depending on the circumstances that they were in. PW3 might have seen DW1 (the Appellant) at the premises once or twice a week because he was not at the premises every day because as testified by DW1 (the Appellant) that PW3 owned many other businesses around Sabah, unlike PW5 who was only a worker at Nasi Kandar Anak Mami The Restaurant 3 (NKAMTR3) and would be at the premises every day. Hence, it is my opinion that both PW3 and PW5 were telling the truth as what they said in Court might differ according to their circumstances.

No evaluation done at the close of defence's case by the learned sessions court judge

[18] The appellant submitted that the learned sessions court judge had failed to provide grounds for believing or disbelieving the prosecution or defence witnesses. The appellant also submitted that there were no findings of facts made by the learned sessions court judge. The learned sessions court judge had also erred for placing a considerable amount of reliance on the testimonies of PW3 and PW5 without considering the testimonies of the defence witnesses. The appellant's documents tendered during trial were also alleged to have not been considered by the learned sessions court judge.

[19] Having perused the grounds of decision of the learned sessions court, this court cannot agree with the appellant and finds this contention to be without merit as all that the appellant alleged to not have been considered by the learned sessions court have been dissected and discussed in great detail in the grounds of decision of the learned sessions court judge. The learned sessions court judge had also explained as to why the testimonies of PW3 and PW5 especially on the issue of ownership of the premises were given credence to as theirs are more consistent with that provided in the trading license of the premises. Nonetheless, this court will not go in great length on this matter because, as aforementioned, the issue of ownership of the premises has no relevance in the constitution of the charge against the appellant.

SENTENCE

[20] Having heard the mitigation and submissions of the prosecution, the learned sessions court judge sentenced the appellant to a fine of RM30,000 in default six months imprisonment. On this, the appellant contended that it is manifestly excessive even after a full trial as this case is only a summons case.

[21] In respect of sentencing, it is trite that the court shall not alter or vary a sentence merely because it might have passed a different sentence. See *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256. Variation is permissible only if the court is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or incongruent with the established

principles of law in the assessment of sentence.

[22] In this present appeal, I find no appealable error made by the learned sessions court judge in passing sentence that would warrant this court's appellate intervention. This court also agrees with the learned sessions court that such heavy sentence of fine is necessary to serve as a lesson to the appellant and any would be offenders to be more observant to the directions of enforcement authorities. Any lesser sentence would be manifestly inadequate rendering the directions of the Assistant Controller issued pursuant to s 21 of Act 723 nugatory. In this instant case, this court find the fine sentence imposed by the learned sessions court judge to be proper and appropriate in order to drive home the message that such incompliance of directions would not be tolerated.

CONCLUSION

[23] Premised on the grounds provided above, this court hereby dismissed this appeal and affirmed the conviction and sentence passed by the learned sessions court judge.

Appeal dismissed and conviction and sentence affirmed.

Reported by Rafinie Ramli